The University of the State of New York

The State Education Department
State Review Officer
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No. 12-176

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for petitioner, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2012-13 school year was not appropriate and ordered the district to establish a policy relating to extended school year services (ESY). The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Due to the nature of the issues in dispute in this appeal, the student's educational history need not be recited here in detail and the parties' familiarity with underlying facts is presumed. Briefly, the student has exhibited significant delays in his intellectual abilities and has been described as medically fragile, having received a diagnosis of tracheal stenosis, and his eligibility for special education and related services as a student with multiple disabilities is not at issue in this appeal (Tr. pp. 7, 25-27; Dist. Ex. 3 at p. 1-2; see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]). According to the parties, the student attended a preschool program, had been the subject of a prior impartial hearing, and the relief granted in an order in the prior proceeding was scheduled to expire on June 30, 2012 (Tr. p. 8; Dist. Ex. 1 at pp. 1, 3). On June 13, 2012 the CSE convened to develop the student's IEP for the 2012-2013 school year (Dist. Ex. 3). The CSE recommended that the student be placed in a 12:1+1 special class and be provided with a full-time paraprofessional, assistive technology devices and services, adapted physical education, and related services

including occupational therapy (OT), physical therapy (PT), and speech-language therapy (Dist. Ex. 3 at. pp 1, 8, 10-11). According to the June 2012 IEP, the CSE found the student ineligible to receive a 12-month program (see Dist. Ex. 3 at p. 9).

A. Due Process Complaint Notice

In an amended due process complaint notice dated June 18, 2012, the student's mother requested an impartial hearing seeking to continue student's current services during July and August 2012 (Dist. Ex. 1at p. 1).[1] Specifically, the parent sought three hours daily of home-based special education itinerant teacher (SEIT) services and related service authorizations (RSAs) for speech-language therapy five times per week for 60 minutes, feeding therapy five times per week for 30 minutes, OT five times per week for 30 minutes, and PT four times per week for 30 minutes (Dist. Ex. 1 at p. 2).

B. Resolution Session

On July 5, 2012, the parties convened for a resolution session (Dist. Ex. 2). In a written agreement, the district agreed to provide the student with all of services requested by the parent for summer 2012 except the SEIT, which the district indicated that the CSE could not offer (id. at p. 3).

C. Impartial Hearing Officer's Decision

On July 23, 2012, the IHO conducted an impartial hearing on the parties' remaining dispute over SEIT services for summer 2012 (Tr. pp. 1-44).[2] In a decision dated August 1, 2012 the IHO determined that the district failed to offer the student a free appropriate public education (FAPE), in part, because the district failed to provide the student with ESY services and the student was "eligible for a twelve month ESY program" (IHO Decision at p. 7). The IHO also found that the district "may not establish a policy to provide ESY to students who satisfy the criteria in New York Commissioner of Education regulation section 200.6(k)(l)-(v) without also conducting an individualized inquiry into the student's eligibility for ESY under Section 200.6(k)(v)" (IHO Decision at p. 7).[3] As relief, the IHO ordered the district to, among other things, provide the student with five hours of SEIT services per week for the remainder of summer 2012 through August 30, 2012, and to modify the student's IEP to indicate his eligibility for a 12-month program" (id.). In addition, the IHO ordered the district to "establish a policy to provide ESY to students in the program categories in Commissioner of Education Regulation Section 200.6(k)(1)-(iv) but to

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[1] An original due process complaint was not included in the hearing record.

[2] The district also agreed to expand the scope of the hearing to include an additional claim regarding the provision of a "barrier free" school (see Tr. pp. 40-44); however, the IHO's resolution of this claim is not disputed in this appeal this appeal.

[3] The IHO also stated in her concluding paragraph that the district "cannot set policies that provide ESY only to students in particular placement categories without permitting the CSE to make an individualized determination based upon Commissioner of Education Regulation Section 200 .6(k)(v)" (IHO Decision at p. 7).

also permit the CSE to make an individualized determination of the need for ESY based upon Commissioner of Education Regulation Section 200.6(k)(v)" (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals from that portion of the IHO's decision which ordered it to establish a policy regarding the provision of ESY services. Specifically, the district argues that the IHO's policy order exceeds the scope of her authority, and was "based on confusion in the record."[4]

The parent did not file an answer to the district's appeal.

V. Discussion

The district's appeal must be sustained because the IHO's directing the district to establish a special education policy exceeded the scope of her authority. The IDEA is designed to ensure, among other things, that students with disabilities have available to them a free appropriate public education (FAPE) (see 20 USC §1400[d][1][A]; see also Forest Grove School Dist. v. T.A., 557 US 230, 239 [2009]; H.C. v. Coton-Pierrepont Cent. Sch. Dist., 2009 WL 2144016 at *1 [2d Cir. 2009]). In New York, an IHO's "authority is circumscribed by statute" in that he or she must make a decision "on substantive grounds based on a determination of whether the child received a [FAPE]" (H.C., 2009 WL 2144016 at *1; see also 20 U.S.C. § 1415[f][3][E][i]; 34 CFR 300.513[a]; 8 NYCRR 200.5[j][4][i]). Issues that do not sufficiently relate to the identification, evaluation, or educational placement of a child, or the provision of FAPE to that child, are not the proper subject of review in a due process proceeding (see, e.g., H.C., 2009 WL 2144016 at *1).

In this case, while the IHO resolved the matter of whether the student was eligible for 12-month services and directed relief accordingly, the IHO thereafter exceeded her jurisdiction by directing the district to adopt a policy in an attempt to redress systemic issues that may have contributed to the lack of 12-month services for the particular student in this case. This determination, however, conflated two separate and distinct matters: (1) whether the district systemically violated the IDEA by carrying out a policy that was inconsistent with the IDEA; and (2) whether the CSE, in this particular instance, adequately assessed the student's needs and provided the student with a FAPE. With respect to the former, there is no provision in the IDEA or the Education Law that confers jurisdiction upon an IHO or SRO to sit in review of alleged systemic violations (see Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has "consistently distinguished . . . systemic violations to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators"], aff'd, 2009 WL 3765813 [2d Cir. Nov. 12, 2009]). Accordingly, I find that while the IHO had jurisdiction over the parent's claim that that the IEP was not based on the student's needs, neither the IHO, nor I for that matter, have plenary authority to order the district to adopt a specific policy in this matter (see, e.g., Application of a Student with a Disability, Appeal No. 12-006; Application of a Student with a Disability, Appeal No. 11-091). Moreover, even assuming for the sake of argument that

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[4] The district does not appeal any other part of the IHO's decision. Accordingly, the IHO's other determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

the IHO had jurisdiction to resolve systemic complaints or direct the district to establish special education policies, the IHO's determination would have to be reversed in this case in any event because there was nothing in the hearing record regarding an ESY policy that had been promulgated by the district—let alone whether such a policy violated the IDEA—because the parent did not assert a complaint about district policies and the parties therefore understandably did not address the matter in the presentation of their cases.

VII. Conclusion

Based on the above, I find that the IHO exceeded her authority by ordering the district to establish a policy with regard to ESY services. Accordingly, I need not address the district's remaining contentions.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 8, 2012 is modified by reversing that portion which directed the district to establish a policy regarding ESY services for students with disabilities.

Dated: **Albany, New York**
August 28, 2013

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JUSTYN P. BATES
STATE REVIEW OFFICER